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In the

Supreme Court of the United States

UNITED STATES OF AMERICA AND
UNITED STATES DEPARTMENT OF AGRICULTURE,
Petitioners,

v.

UNITED FOODS, INC.,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF *AMICI CURIAE* JEANNE AND STEVE CHARTER, NORTHERN PLAINS RESOURCE COUNCIL, INC., THE WESTERN ORGANIZATION OF RESOURCE COUNCILS, DAKOTA RESOURCE COUNCIL, POWDER RIVER BASIN RESOURCE COUNCIL, THE IDAHO RURAL COUNCIL, AND THE CAMPAIGN FOR FAMILY FARMS IN SUPPORT OF RESPONDENT

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BRIEF OF *AMICI CURIAE*

Pursuant to Rule 37, Rules of the Supreme Court, *amici curiae* Jeanne and Steve Charter, Northern Plains Resource Council, Inc., the Western Organization of Resource Councils, Dakota Resource Council, Powder River Basin Resource Council, the Idaho Rural Council, and the Campaign for Family Farms submit the following brief for consideration by the Court in resolving the issues in this appeal.[1]

STATEMENT OF INTEREST

Jeanne and Steve Charter (Charters) are residents of the State of Montana and operate a ranch near Shepherd, Montana. Charters also market some of their cattle directly as high quality beef under the name, Charter Ranch Beef. Charters, as producers of cattle, are subject to the Beef Promotion Research Act and Order (Beef Act and Beef Order). 7 U.S.C. § 2901 *et seq.*; 7 C.F.R. §§ 1260.101-1260.217. The Beef Act and Beef Order is similar to that of the mushroom promotion program at issue in this case because producers of cattle are required under the Act and Order to pay a $1.00 per head assessment on all cattle sold or imported into the United States. The payment is collected and remitted directly to the Cattlemen's Beef Board or a qualified state beef council to pay for beef promotion and education programs. 7 U.S.C. § 2904(8)(A)-(C); 7 C.F.R. §§ 1260.172(a)(1), 1260.310, 1260.311(a), and 1260.312(c).

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party to these proceedings authored, in whole or in part, this amici curiae brief. No other entity or person, aside from the amici, made any monetary contribution for the preparation or submission of this brief to the Court.

Proceedings were instituted against the Charters by the USDA in 1998 for the non-payment of the $1.00 assessment on the sale of 250 head of cattle. The Secretary of Agriculture entered a final decision adverse to Charters. Thereafter, Charters filed a petition for judicial review in the United States District Court for the District of Montana challenging the constitutionality of the Beef Act and Beef Order. This petition is pending in District Court at the filing of this brief.

The Northern Plains Resource Council (NPRC) is a non-profit corporation existing under the laws of the State of Montana. NPRC is a 29 year old grass roots citizens group dedicated to protecting Montana's family agriculture and air, land and water. NPRC has many cattle producer members who are obligated to pay assessments pursuant to the Beef Act and Beef Order but who oppose this program. On behalf of its producer members, NPRC worked to end the mandatory assessment under the Beef Act and Beef Order by campaigning for a producer referendum to terminate the program.

The Western Organization of Resource Councils (WORC) is an association of six grassroots organizations in North Dakota, South Dakota, Idaho, Montana, Wyoming and Colorado. The members of these affiliated groups are farmers, ranchers, small businessmen, and working people seeking to protect natural resources, family farms, and rural communities. Some of these members are obligated to pay the assessment under the Beef Act and Beef Order. These groups are likewise opposed to compelled advertising programs.

The Dakota Resource Council (DRC) is a grassroots organization formed in 1978 to work on the protection of North Dakota's land, air, water, rural communities and agricultural economy. Members of the DRC are obligated to pay assessments pursuant to the Beef Act and Beef Order and otherwise oppose compelled advertising programs.

The Powder River Basin Resource Council (PRBRC) is a grassroots organization committed to the preservation and enrichment of Wyoming's agricultural heritage and rural lifestyle. The PRBRC, likewise, has members who are obligated to pay assessments under the Beef Act and Beef Order and are opposed to compelled advertising programs.

The Idaho Rural Council is a grassroots organization working to preserve Idaho's family farms and rural communities and build a more sustainable society. Its members include ranchers and farmers who raise cattle and are obligated to pay the mandatory beef checkoff under the Beef Act and Beef Order and are opposed to compelled advertising programs.

The Campaign for Family Farms (CFF) is an unincorporated association of family farm and community membership organizations, including the Land Stewardship Project (Minnesota), Iowa Citizens For Community Improvement, Missouri Rural Crisis Center and the Illinois Stewardship Alliance, which advocates for independent hog producers. CFF member organizations oppose mandatory checkoff assessments which all hog producers must pay pursuant to the Pork Promotion, Research and Consumer Information Order. 7 U.S.C. §§ 4801-4819; 7 C.F.R. § 1230. This program is similar to that of the mushroom promotion program at issue in this case because it is funded by mandatory producer assessments on all swine sold and pays for promotion, research and education programs related to pork. At the request of pork producer members, CFF conducted a petition drive and submitted to the USDA a petition signed by more than 19,000 pork producers calling for a referendum on termination of the mandatory pork checkoff program. USDA conducted a producer referendum through which a majority of producers voted to terminate the

program.[2] Former United States Agriculture Secretary Dan Glickman announced the program would be terminated based on this majority vote by producers.[3] Agriculture Secretary Ann Veneman has now reversed this decision and has decided not to terminate the Pork Checkoff Program despite the majority vote of producers for termination.[4]

This brief is filed pursuant to Rule 37.3(a), Supreme Court Rules. The requisite consent letters have been filed with the Clerk.

INTRODUCTION

The *amici* herein requested consent to file their brief because this Court's ruling on the Sixth Circuit decision in *United Foods* will impact their ability to challenge the constitutionality of the Beef and Pork Promotion and Research Acts and Orders.[5] The rationale of *United Foods* is compelling and should be affirmed. Such affirmation will call into question the constitutionality of similar marketing and promotion orders such as the Beef and Pork Promotion Orders. *Amici*, due to their involvement in the production side of various agricultural commodities, deal with the day-to-day direct and indirect effects and results of the promotion orders. *Amici* believe it would be helpful to the Court for an explanation of the constitutional infirmities they experience.

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[2] 65 Fed. Reg. 43,498 (July 13, 2000).

[3] United States Department of Agriculture, *Statement of Secretary of Agriculture Dan Glickman on the Pork Checkoff Referendum*, USDA News Release No. 0015.01 (Jan. 11, 2001).

[4] United States Department of Agriculture, *USDA Announces Pork Checkoff Program to Continue Under Settlement That Requires Program Restructuring*, USDA News Release No. 0037.01 (Feb. 28, 2001).

[5] *United Foods, Inc. v. United States of America*, 197 F.3d 221 (6th Cir. 1999).

SUMMARY OF THE ARGUMENT

The Mushroom Act at issue in this case is similar to the Beef and Pork Acts in structure and in mandatory assessments which are used to fund advertising, research and educational programs. The beef and pork industries are unregulated and producers must compete in an open market. There is no comprehensive regulation of the beef and pork markets. The beef and pork markets, like the mushroom market, have not been collectively exempted from antitrust laws or otherwise subsidized through price supports or restrictions on supply.

The Sixth Circuit decision in *United Foods* should be affirmed because it properly followed the principals in *Glickman v. Wileman Brothers & Elliot, Inc., et. al.*, 521 U.S. 457 (1997). *Wileman* stands for the proposition compelled advertising is appropriate in a collectivized industry where the nature of the advertising is non-ideological. The Sixth Circuit decision is consistent with precedent of this Court involving the funding of various compelled activities. This prior precedent has plainly set forth the rule that highly collectivized industrial sectors may force certain individuals to support or pay for particular activities so long as they are related to the purpose of the collectivization. In the case at bar, since the mushrooms, beef and pork industrial sectors are not collectivized, the rule set forth in this Court's prior precedent involving highly collectivized industrial sectors is inapplicable. Consequently, the first part of the test involving collectivization of the industry to support compelled advertising fails.

The second part of the test is whether the compelled speech is non-ideological and non-political. The experience of producers in the beef and pork checkoff programs is that such promotion is not non-ideological nor it is non-political. Repeatedly beef producers and pork producers are associated

with messages and political positions to which they vehemently oppose and object. This occurs because the private commercial entities operating the beef and pork checkoff programs receive the bulk of the mandatory assessments and thereby represent themselves as speaking on behalf of all beef and pork producers. Such representations are plainly not non-ideological and not non-political. Consequently, the programs violate the First Amendment rights to free speech and free association.

ARGUMENT

I. The Mushroom Act and the Beef and Pork Acts are Similar

The Beef Promotion and Research Act (Beef Act) became law in 1985. 7 USC §§ 2901-2910. The Beef Act required the Secretary of Agriculture to establish a Beef Promotion and Research Order which would provide for the financing of beef promotion and research in the United States. *Goetz v. Glickman,* 149 F.3d 1131, 1132 (10th Cir. 1998). Though somewhat of a misnomer because producer assessments are mandatory, this program is commonly known as the beef checkoff program. The promotion and research is funded through assessments on cattle sold and imported into the United States. *Id.* The Beef Order established by the Secretary of Agriculture created the Cattlemen's Beef Promotion and Research Board (CBB) and the Beef Promotion Operating Committee (BPOC). *Id.* The CBB is made up of cattle producers and importers appointed by the Secretary from nominations submitted by a strictly prescribed group of commodity associations. The CBB's principal duties are to administer the Beef Order, make rules and regulations to effectuate the terms of the Beef Order, and elect members to serve on the BPOC. The BPOC is composed of 10

members of the CBB and 10 members selected by certain state federations or beef councils. The BPOC develops and submits to the Secretary the promotion, advertising, research, consumer information industry plans and projects funded by the $1.00 assessment (checkoff). The Beef Act and Beef Order prohibit funds being used in any manner for the purpose of influencing governmental action or policy, with the exception of recommending amendments to the Order. 7 U.S.C. § 2904(10); 7 C.F.R. § 1260.169(e). However, as demonstrated below, these provisions have not stopped the organization receiving the beef producer assessments from compelling all beef producers to be associated with its ideological and political speech.

The operation of the Beef Act and Beef Order changed decidedly in approximately 1995. At that time, the USDA recognized the formation of the National Cattlemen's Beef Association (NCBA) as an entity authorized to submit names to the Secretary for individuals who may serve on the BPOC and as an eligible contract entity pursuant to other provisions of the Beef Act and Beef Order.[6] The NCBA became an umbrella entity responsible for receipt of 90 percent of the checkoff funds.[7] The NCBA utilizes joint staffing agreements and thereby provides the bulk of program operations needed by the CBB.[8] In 1998, NCBA administered through joint staffing agreements with the CBB, over 90 percent of

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[6] November 20, 1995, *letter of Monte Reece to Barry Carpenter,* Exhibit B4, *In re Jeanne and Steve Charter,* BPRA Docket No. 98-0002.

[7] Testimony of Monte Reece; transcript of proceedings at 86, August 4, 1999, *In re Jeanne and Steve Charter,* BPRA Docket No. 98-0002.

[8] Testimony of Monte Reece; transcript of proceedings at 89-90, August 5, 1999, *In re Jeanne and Steve Charter,* BPRA Docket No. 98-0002.

approximately $55,000,000.00 per year in checkoff funds.[9] A solid majority of other associations eligible to nominate members to the CBB are also NCBA related state affiliates.

The Pork Promotion, Research and Consumer Information Act (Pork Act) became law in 1985. 7 U.S.C. § 4801 *et seq.* The Pork Act required the Secretary of Agriculture to establish a pork promotion, research and consumer information order which would provide for pork promotion, research and education. 7 U.S.C. § 4803. Though somewhat of a misnomer because producer assessments are mandatory, this program is commonly known as the pork checkoff program. This program is administered by the National Pork Producers Delegate Body (Delegate Body) and the National Pork Board. 7 U.S.C. § 4806. The Secretary of Agriculture appoints Delegate Body members from pork producers who have been nominated by state organizations as set out in regulations governing the pork checkoff program. 7 C.F.R. § 1230.31. Importer members are selected by the Secretary after consultation with importers. 7 C.F.R. § 1230.31. The Delegate Body recommends the rate of the pork checkoff assessment, determines the percentage of net assessments attributable to state associations, and elects hog producers and importers for appointment by the Secretary to the 15 member National Pork Board. 7 C.F.R. § 1230.39. The National Pork Board develops budgets and awards contracts which are supposed to carry out the intent of the pork checkoff program. 7 U.S.C. § 4808(b). The Pork Act and Pork Order prohibit funds being used in any manner for the purpose of influencing legislation or governmental policy or action, with the exception of recommending amendments to the Order. 7 U.S.C. § 4809(e); 7 C.F.R. § 1230.74(a). However, as demonstrated below, those provisions have not

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[9] *Id.* at Testimony of Monte Reece at 89.

stopped the organizations receiving pork producer assessments from compelling all pork producers to be associated with its ideological and political speech.

The Pork Act acknowledged an existing non-profit organization, the National Pork Producers Council (NPPC), as an entity for facilitating implementation of the Pork Act. 7 U.S.C. § 4809. Thus, Congress authorized temporary disbursement of pork checkoff funds directly to NPPC in 1986. *Id.* Within a short time, NPPC became the National Pork Board's primary contractor for spending the proceeds of the assessments.[10] According to USDA's Office of Inspector General, the National Pork Board presently contracts with NPPC "to provide working space; routine personnel, administrative, and accounting services; and the technical and professional applications necessary to implement requirements of the Act."[11] Since 1996, the National Pork Board has awarded all program grants to NPPC.[12]

Mushrooms, like beef and pork, are subject to an order from the Secretary of Agriculture establishing a council made up of producers nominated for appointment by the Secretary. 7 U.S.C. § 6104(b); 7 C.F.R. § 1209. Similarly, the mushroom order directed the council to carry out programs, plans and projects to provide maximum benefit to the mushroom industry. The council's activities were funded through mandatory assessments on various producers. 7 U.S.C. § 6104(g); 7 C.F.R. § 1209.51. As in beef and pork, these funds were to be used for generic advertising efforts and not for any political purposes. 7 U.S.C. § 6104(h).

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[10] Office of Inspector General, United States Department of Agriculture, Evaluating Report No. 01801-I-KC, *Agricultural Marketing Service Controls Over Pork Checkoff Funds* (Mar. 1999) at 1-2.

[11] *Id.*

[12] *Id.*

II. The Decision of the Sixth Circuit in *United Foods* Should Be Affirmed

The Court of Appeals' decision at issue here interprets *Wileman* to require a two step analysis for determining when compelled, commercial speech, such as agricultural commodity promotion programs funded by mandatory producer assessments, violate the First Amendment. This decision should be affirmed because it properly applies *Wileman* and is consistent with other Supreme Court precedent regarding compelled speech and association.

The Sixth Circuit, in *United Foods,* concluded:

> [T]he explanation for the *Wileman* decision is to be found in the fact that the California tree fruit industry is fully collectivized and is no longer a part of a free market, as well as in the nonpolitical nature of the compelled speech. The majority uses the concept of collectivization and the nonideological nature of the advertising together. The conjunction "and" germaneness "and" nonpolitical—is used in the Court's holding. Our interpretation of *Wileman* is that if either of the two elements is missing—either the collectivization of the industry or the purely commercial nature of the advertising—the First Amendment invalidates the compelled commercial speech. . . . The Court's holding in *Wileman,* we believe, is that nonideological, compelled, commercial speech is justified in the context of the extensive regulation of an industry but not otherwise. The purpose of this principle joining regulation and content is to deter free riders who take advantage of their monopoly power resulting from regulation of price and supply without paying for whatever

commercial benefits such free riders receive at the hands of the government.

197 F.3d at 224. *Wileman* clearly supports the Sixth Circuit's holding that both elements—collectivization of the industry and non-ideological speech—must be met for compelled, commercial speech in the context of mandatory agricultural commodity promotion programs to withstand a First Amendment challenge. The mushroom program fails the test because it did not meet the collectivization of the industry element. The Beef and Pork Promotion and Research programs would fail for the same reason. In addition, these programs also fail to meet the non-ideological speech element of the analysis.

III. *Wileman* and Related Precedent Establish That Compelled Advertising Assessments Are Constitutional Only in the Context of Comprehensive Market Regulation.

Collectivization of the particular industry was a central component of the analysis in *Wileman.* The Court specifically acknowledged the Agricultural Marketing Act of 1937 was enacted to establish and maintain an orderly market condition and fair prices for agricultural commodities. *Wileman,* 521 U.S. at 461. This marketing order displaced competition in various discreet markets. *Id.* The Court noted, "Collective action, rather than the aggregate consequences of independent competitive choices, characterizes these regulated markets." *Id.* The collectivization manifested in mechanisms for uniform price, limits on the quality and quantity which could be marketed, size and grade determinations, and orderly disposition of surpluses. *Id.* In the third portion of the *Wileman* opinion, the Court wrote:

> In answering that question we stress the importance of the statutory context in which it arises. California nectarines and peaches are marketed pursuant to detailed marketing orders that have displaced many aspects of independent business activity that characterize other portions of the economy in which competition is fully protected by the antitrust laws. The business entities that are compelled to fund the generic advertising at issue in this litigation do so as a part of a broader collective enterprise in which their freedom to act independently is already constrained by the regulatory scheme. It is in this context that we consider whether we should review the assessments used to fund collective advertising, together with other collective activities. . . .

Id. at 469. The generic advertising program made sense in *Wileman* because all of the respondents were engaged in the business of marketing certain California fruits and it was presumed they agreed with the central message or speech in the generic program. *Id.* at 470. It was a basic policy decision in volatile markets for agricultural commodities that the public would be best served by compelling cooperation among producers in making economic decisions rather than would otherwise be made in a free market.

The Sixth Circuit in *United Foods* would have erred had it not followed this market collectivization analysis in *Wileman.* The notations just set forth demonstrate the focused analysis applied by the Court and the utmost importance the collectivization of the California fruit market played in the analysis. Similarly, the Sixth Circuit focused on the economic collectivization analysis when it looked at the mushroom market and found it was unregulated. The logical extension from *Wileman* is forced or compelled advertising in an

unregulated market—like beef, pork or mushrooms—had to be unconstitutional. *United Foods,* 197 F.3d at 222.

United Foods is consistent with other precedent involving compelled speech or association. This older precedent arose out of disputes in highly collectivized economic situations. The precedent utilized in *Wileman* demonstrated that compelled speech or association, even in the commercial context, would only be tolerated if it were germane to the underlying collective action. Collectivization limited solely to promotion and research purposes in otherwise unregulated markets should not permit application of the rule in *Wileman.*

Abood involved a Michigan law which permitted union representation for local government employees. *Abood v. Detroit Board of Education,* 431 U.S. 209, 211 (1977). A union and local government employer were permitted to establish agency shop arrangements. This meant every employee was represented by a union, even though not a member of the union, and was required to pay the union a sum equal to the union dues. *Id.* at 211. The dispute involved a teacher's union and whether dues of teachers opposing certain union activities unrelated to collective bargaining could be used to pay for those activities. *Id.* at 212-13. The analysis in *Abood* focused on collective bargaining which was justified by the legislative conclusion about the important contribution of the union shop to the system of labor relations in the United States. *Id.* at 222-23. *Abood* set forth the rule the Constitution requires expenditures for something other than collective bargaining be financed from receipts by individuals who do not object to financing those ideas and who are not coerced into doing so. *Id.* at 235-36.

Next, in *Chicago Teachers Union,* the Court addressed whether a collective bargaining contract provision could permit a board of education to deduct from non-union teachers an amount equivalent to union dues. *Chicago*

Teachers Union Local No. 1 v. Hudson, 475 U.S. 292, 294-95 (1986). The issue here was whether procedures by the Chicago Teachers' Union and approved by the board of education adequately protected the non-union protestors to this contract provision. *Id.* at 302. The Court held a union's collection of agency fees to solve a free ridership problem required an adequate explanation of the basis for a fee, a prompt opportunity to challenge the amount of the fee, and an escrow for the amounts reasonably in dispute while the challenges were pending. *Id.* at 310.

Keller, likewise, involved a highly collectivized economic entity. *Keller v. State Bar of California,* 496 U.S. 1, 4 (1990). Specifically, the California State Bar was integrated. *Id.* at 4-5. Integrated meant it was an association of attorneys where membership and dues were required as a condition for practicing law. *Id.* at 5. Lawyers sued the state bar claiming certain bar activities utilized their mandatory dues payments for political and ideological causes to which they objected. *Id.* at 4. The lawyers asserted the compelled financial support of such activities violated their First and Fourteenth Amendment rights to free speech and free association. *Id.* A substantial analogy was noted between the integrated bar of the State of California and employee unions and their members. *Id.* at 12. The Court applied *Abood* and held:

> The State Bar may therefore constitutionally fund activities germane to those goals out of the mandatory dues of all members. It may not, however, in such manner fund activities of an ideological nature which fall outside of those areas of activity.

Id. at 14. The guiding principal to be utilized was whether the challenged expenditures were necessarily or reasonably

incurred for the purpose of regulating the legal profession or improving the quality of the legal services available to the people of the state. *Id.*

The lesson of *Abood, Chicago Teachers, Keller* and *Wileman* is the underlying extensive collective activity dictates when compelled speech is justified. For compelled speech to pass constitutional muster, it must be related to and support the underlying collective action. This is the central theme from precedent. As the Sixth Circuit found below, the type of collective activity contemplated in *Wileman,* however, does not exist in the mushroom industry nor does it exist in the beef or pork industries. Beef and pork production and marketing are not done through collective action. Each beef and pork producer competes with other producers to sell animals in a free market. There is no regulatory scheme which sets uniform prices, subsidizes prices, or controls supplies. There is no protection from market fluctuations and there is no orderly disposition of surplus to avoid depressed prices. One only needs to note the USDA's own study in regard to market fluctuations and depressed beef markets.[13] Unlike the fruit producers in *Wileman,* beef and pork producers do not market their animals through collective action which is exempt from antitrust laws. In the beef and pork sectors there is no collective bargaining as in *Abood* and *Chicago Teachers.* There is no required membership to sell

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[13] Mathews, Hahn, Nelson, Duewer & Gustafson, *The U.S. Beef Industry Cattle Cycles Price Spread and Packer Concentration,* Economic Research Service/USDA, Technical Bulletin 1874 (April, 1999) (cattle cycle operates in an environment involving natural and biological factors, cattle numbers, grain exports, government programs, and other factors in addition to biological lags). Similar circumstances are evident in the hog markets. Jeffrey S. Becker, Congressional Research Service Issue Brief, *Hog Prices: Questions and Answers* (Dec. 15, 1999) <<http://www.cnie.org./nle/ag-68.html>> (last visited Mar. 5, 2001).

swine and cows as there was for lawyers to practice law in *Keller*.

When the government enters a market by authorizing collective action, which is not only exempt from antitrust laws but also displaces many aspects of independent business activity which characterizes other portions of the economy in which competition is fully protected, to provide certain benefits to producers, it is appropriate to require those producers promote the program under which they enjoy these benefits. Philosophically, however, the same rule should not apply in situations where there is no such collectivization. Producers should not be forced to pay as in *Abood, Chicago Teachers* or *Keller* unless their activity is collectivized to the same degree. There is no such collectivization for mushroom, beef or swine producers.

IV. *Wileman* and Related Precedent Establish That Compelled Advertising Assessments Are Unconstitutional if They Involve Political or Ideological Speech.

In Section IV of the *Wileman* decision, this Court thoroughly discusses precedent regarding compelled speech and association. *Wileman*, 521 U.S. at 469-474. This discussion clearly buttresses the Sixth Circuit's application of the second element of the test it applied to determine whether the Mushroom Promotion Order violated the First Amendment. This second element is whether the compelled speech is non-ideological and non-political. It is imperative this second element be maintained in analyzing whether agricultural commodity promotion and research orders funded by mandatory producer assessments violate the First Amendment. There are many ways which such programs may be used to compel producers to finance and be associated with ideological or political speech, thus creating the very crisis of

conscience for many producers that the First Amendment is designed to protect against.

The following discussion demonstrates how the current beef and pork promotion and research orders administer compelled ideological and political speech. One example of compelled ideological speech is the use of mandatory beef producer assessments to pay for promotion of branded products. Since the formation of the NCBA and the USDA's recognition of it as the principal beef checkoff contractor and program operating entity, the emphasis has shifted from generic advertising into branded product promotion for the largest food processors in the United States. The NCBA has devoted substantial sums of checkoff money in recent years to develop and promote to consumers highly processed, centrally manufactured beef products. For example, the beef checkoff has partnered closely with the giant processor, Hormel Foods, to promote "Hormel Beef Tips With Gravy" among other trademarked Hormel Foods offerings. Beef is only 1 of 22 listed ingredients in the particular product. Such branded product promotion is ideological speech because it does not promote beef in general, but rather, a specific manufactured beef product.

Amici object for ideological reasons to the use of checkoff funds for promoting highly processed meats because its path, in their view, will end in further industry vertical integration and centralization to their own disadvantage and detriment. Such promotion turns consumers away from purchasing high quality, unadulterated, perishable, wholesome meats, such as Charters' and *amici* organizations' members' produce, and towards consumption of lower quality denatured products. The current branded product marketing emphasis of the beef checkoff serves to devalue Charters' and the *amici* organizations' producer members' beef into one of many cheap ingredients combined in a centrally manufactured industrialized system of fast food production. Displacement

of pure beef with highly processed product will end the *amici's* way of doing business, which is not only necessary to their individual livelihoods but also the traditional decentralized economic and social foundation for many regions of the rural United States.

Charters and the *amici* organizations' producer members are opposed to the beef checkoff's branded product promotion, yet these producers are continually compelled to finance promotions which they oppose from an ideological perspective. They are also associated with this compelled speech when checkoff funded branded product and generic advertising indicates the products are supported by America's beef producers. Consequently, not only are Charters and the other *amici* organizations' producer members required to fund a marketing strategy and centrally manufactured products which work to the disadvantage of their own high quality beef products, they are associated with that very same product against their will.

Another example of how beef producers are compelled to finance and be associated with political or ideological speech is through the NCBA's claim to represent all of the nation's beef producers when it makes public statements on policy issues not purely associated with beef promotion. For instance, in 1995, NCBA issued a report indicating its new post-merger structure would mean the industry would speak with *one voice on beef issues* and that it would be able to focus all available resources on a single long-range plan with a single set of objectives.[14] (Emphasis added.) Next, NCBA began advocating "the National Cattlemen's Beef Association is the marketing organization and trade association for America's *one million cattle farmers and ranchers.* With

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[14] Memo, November 16, 1995, National Cattlemen's Beef Association Report to the industry.

offices in Denver, Chicago and Washington, D.C., NCBA is a consumer focused, producer directed organization representing the largest segment of the nation's food and fiber industry."[15] (Emphasis added.) The only way NCBA can claim to speak on behalf of "America's one million cattle farmers and ranchers" is because these producers must pay the mandatory checkoff assessments which NCBA gets to spend. NCBA cannot claim one million cattle producer dues paying members. Yet, NCBA repeats this claim of representing all cattle farmers and ranchers and acts to speak, as one voice, for the entire beef industry over and over in support of its positions on numerous public policy issues which are unrelated to beef promotion. This claim was repeated on August 7, 1997, when the NCBA supported biotechnology and genetic engineering research.[16] It was again repeated when NCBA advocated approval of fast track trade agreements[17] and applauded the use of irradiation in the beef industry.[18] Because all of the nation's beef producers are required to pay checkoff assessments, the vast majority of which funds are contracted to NCBA, it claims representation

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[15] National Cattlemen's Beef Association, Press Release (June 25, 1997).

[16] National Cattlemen's Beef Association, Statement (Aug. 7, 1997) ("initiated in 1898, the National Cattlemen's Beef Association is the marketing organization and trade association for America's one million cattle farmers and ranchers. . . .").

[17] National Cattlemen's Beef Association, Press Release (Oct. 22, 1997) ("initiated in 1898, the National Cattlemen's Beef Association is the marketing organization and trade association for America's one million cattle farmers and ranchers. . . .").

[18] National Cattlemen's Beef Association, Press Release (Dec. 2, 1997) ("initiated in 1898, the National Cattlemen's Beef Association is the marketing organization and trade association for America's one million cattle farms and ranchers. . . .").

of all of the nation's producers when it exercises political speech by lobbying Congress on specific policy positions.[19]

NCBA has taken specific policy positions in lobbying Congress on legislation which would mandate packer's publicly report prices paid for live cattle, and on other legislative issues, while representing to Congress it is acting on behalf of over one million beef producers from across the country.[20] Many of the policy positions NCBA advocates in the name of all beef producers are vehemently opposed by Charters and the other *amici* organizations' beef producer members. Because the mandatory checkoff assessments are the basis for NCBA's claims that it speaks on behalf of all the nation's cattle producers when advocating specific public policy positions, these programs are being used to compel political and ideological speech by *amici* producers in violation of the First Amendment principles set out by this Court.

The mandatory producer assessments which fund the Pork Promotion, Research and Consumer Information Order (pork checkoff program) are also being used to compel *amici* organizations' pork producer members to finance, and to be associated with, political and ideological speech to which they are opposed. Pork checkoff funds are used to produce a website. The home page of the site states it is "a service of the National Pork Producers Council in cooperation with the National Pork Board."[21] At the bottom of many of the separate information pages on this website, including those

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[19] George Swan, president-elect, NCBA, Testimony to Senate Committee on Agriculture, Nutrition and Forestry (June 10, 1998).

[20] Congressional Record, Senate, July 15, 1998 (letter from NCBA, July 14, 1998).

[21] National Pork Producers Council, *Home Page* <<http://www.nppc.org>> (last visited Mar. 5, 2001).

which address and advocate for specific public policy positions unrelated to pork promotion, it states: "A service of the National Pork Board as implemented by the National Pork Producers Council (NPPC)."[22] Both through the direct use of the pork checkoff funds to partially pay for this website, and by reference to the National Pork Board which is funded exclusively by the mandatory pork checkoff and whose sole responsibility is administration of the pork checkoff program, pork producers, through their assessments, are being compelled to finance and be associated with political and ideological speech.

One example of political and ideological speech included on a page of NPPC's website, which includes the statement "A service of the National Pork Board as implemented by the National Pork Producers Council (NPPC)," is Congressional testimony of NPPC Director John Caspar regarding the impact of agribusiness concentration on producers and consumers.[23] *Amici* organizations' pork producer members are ideologically opposed to many of the policy related statements made in this Congressional testimony. However, they have been compelled to finance the public dissemination of this political and ideological speech through their checkoff assessments. In addition, in this specific testimony, Mr. Caspar reported to the Congressional committee that he was speaking on behalf of the nation's pork producers: "Today, I am representing America's pork producers."[24] Like the NCBA's similar claims to speak on behalf of all beef producers, NPPC is using the fact that all of the nation's pork

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[22] *Id.*

[23] National Pork Producers Council, *Pork Industry Testimony Jon Caspers* <<http://www.nppc.org/NEWS/testimony000510.html>> (last visited Mar. 5, 2001).

[24] *Id.*

producers must pay checkoff assessments as a basis for claiming to speak on their behalf. These mandatory producer assessments are thus compelling *amici* organizations' pork producer members to finance and to be associated with political and ideological speech to which they are steadfastly opposed in violation of First Amendment principles discussed by this Court in the *Wileman* decision.

In *Wileman*, the Court took particular note of circumstances which would violate the First Amendment right to free speech or association. One of these was where the promotional program might compel producers to endorse or finance any political or ideological views. 521 U.S. at 470. A First Amendment violation was also noted in *Wileman* by requiring someone to use their own property to convey an antagonistic ideological message, or forcing them to respond to a hostile message when they would prefer to remain silent, or require them to be publicly identified or associated with another's message. *Id.* at 471. In the beef and pork checkoff programs, *amici* and their members are compelled to endorse or finance political or ideological views which they oppose. They are required to use their own property consisting of the compelled assessments to convey an antagonistic ideological message or, more importantly, are publicly identified or associated with the message of the NCBA or the NPPC. In *Abood* and *Keller*, the teachers union and the State Bar of California were prohibited from the expenditure of funds on political messages unrelated to the reason for their economic existence. Likewise was the conclusion in *International Ass'n of Machinists v. Street*, 367 U.S. 740 (1961); *see also Pruneyard Shopping Center v. Robins*, 447 U.S. 74, 88 (1980). In *Pruneyard*, the Court expressed the view that being compelled to affirm a belief in a prescribed position or view could violate the First Amendment.

The Court has also been concerned about the constitutionality of requiring a utility to place in its billing

statements certain political announcements or positions regarding legislation which could adversely affect its business. The Court notes the central thrust of the First Amendment is to prohibit improper restraints on the voluntary public expression of ideas, with a corollary freedom not to speak publicly. *Pacific Gas & Electric Co.v. Public Utility Comm'n of California,* 475 U.S. 1, 9 (1986). In *Pacific Gas,* a First Amendment violation occurred by requiring a utility to include a particular message on its billing statements. The fear was the appearance of such a message would leave the appearance the utility agreed with the message. *Pacific Gas,* 475 U.S. at 15-16. So should it be here where the members of the *amici* are publicly associated with particular positions before Congress and elsewhere. The Court has noted for *corporations* and *individuals* alike the choice to speak includes with it the choice of what not to say. *Roberts v. United States Jaycees,* 468 U.S. 609, 622 (1984). The actions of the NCBA and NPPC force *amici* to support positions they oppose, and with their money. These actions improperly impinge upon what should be considered a harbinger of individual liberty and the type of highly personal relationships which are subject to preservation without impingement by the government or, particularly, the NCBA or NPPC. *Roberts,* 468 U.S. at 618-619. Requiring the members of the *amici* to be associated with specific messages of these industry related organizations strikes at the heart of the crisis of conscience the Court has previously mentioned.

CONCLUSION

The Court should affirm the Sixth Circuit decision in *United Foods.* The Sixth Circuit properly interpreted *Wileman* to include a two prong test to determine whether agricultural commodity promotion and research programs funded by mandatory producer assessment violate producer's First

Amendment protections. *Wileman* clearly supports the Sixth Circuit's holding both elements—collectivization of the industry with the effect of restraint on competition and non-ideological speech—must be met for compelled, commercial speech in the context of mandatory agricultural commodity promotion programs to withstand a First Amendment challenge. Some commodity promotion programs may fail to pass constitutional muster under one or both of these elements. In the mushroom, beef and pork sectors alike, there is no regulated collectivization which impacts open competition. Thus, these programs should fail to pass constitutional muster under the first element of the test. Additionally, in the beef and pork sector, aspects of the promotion programs fail the second element of the test because they compel producers to finance and/or to be associated with political or ideological speech to which they are opposed.

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